Supreme Court, U.S.
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No. 93-1728

In The

Supreme Court of the United States

October Term, 1993

DOROTHEA O'DRISCOLL,

Petitioner,

v.

HERCULES, INC., a Delaware corporation, JOHN F. BAKER, EDWARD D. McDONALD,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Does an employee forfeit all remedies under the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964 when evidence obtained by her employer for the first time after her discharge shows that she engaged in a pattern of dishonesty constituting felonies under state or federal law which continued to the date of her discharge and for which she would have been discharged had the facts been known by her employer?

PARTIES INVOLVED

All of the parties involved in this action are listed in the caption. Respondent Hercules, Inc., a corporation, has no parent company, but partially owns the following twenty-three subsidiary companies: Tastemaker Pty. Ltd. (Australia); Polo Industria e Comercio Ltda. (Brazil); Tastemaker, Inc. (Canada); Algas Marinas S.A. (Chile); Tastemaker Holdings Limited (England); Abieta Chemie GmbH (Germany); P.T. Hercules Mas Indonesia (Indonesia); Rika-Hercules Incorporated (Japan); Sumika-Hercules Company, Ltd. (Japan); Tastemaker K.K. (Japan), Teijin-Hercules Ltd. (Japan); Hercules Korea Chemical Co. Ltd. (Korea); Taloquimia, S.A. (Mexico); Tastemaker S.A. (Mexico), Tastemaker B.V. (The Netherlands); Tastemaker Ltd. (New Zealand); Pakistan Gum Industries Limited (Pakistan); Tastemaker Pte. Ltd. (Singapore); Taiwan Hercules Chemicals Inc. (Taiwan); BHC Laboratories, Inc. (U.S.A.); Hercules-Sanyo, Inc. (U.S.A.); HISPAN Corp. (U.S.A.); Tastemaker (USA).

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DOROTHEA O'DRISCOLL,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

Respondents, by and through their attorneys of record, hereby submit their brief in opposition to the petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the United States District Court for the District of Utah granting summary judgment to Hercules is reported at *O'Driscoll v. Hercules, Inc., et al,* 745

F. Supp. 656 (D. Utah 1990) (hereinafter "Trial Court Decision").

The opinion of the Tenth Circuit Court of Appeals affirming summary judgment for Hercules is reported at *O'Driscoll v. Hercules, Inc., et al,* 12 F.3d 176 (10th Cir., January 5, 1994) (hereinafter "Appeals Court Decision"), *petition for cert. filed* (April 1, 1994). Respondents have reproduced the Appeals Court Decision in their appendix because petitioner's version omits language critical to the Supreme Court's disposition of this writ.

JURISDICTION

The judgment that petitioner seeks to review was entered by the Tenth Circuit Court of Appeals on January 5, 1994. The Supreme Court, however, does not have jurisdiction over the resume fraud issue raised by petitioner because the Tenth Circuit Court of Appeals expressly did not pass upon that issue. *See* "Reasons for Denying the Petition," *infra* at 9-14. Therefore, although petitioner has timely filed her petition seeking reversal of the Tenth Circuit Court of Appeals' decision which granted summary judgment against petitioner on two federal claims, the Supreme Court should not properly grant a writ of certiorari in this matter. Jurisdiction is thus lacking under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved in the instant action are set forth below:

1. 18 U.S.C. § 1001 (1976).

"§ 1001. *Statements or entries generally.*

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

2. 28 U.S.C. § 1254(1) (1988).

"§ 1254. *Courts of appeals; certiorari; certified questions.*

Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil action or criminal case, before or after rendition of judgment or decree . . . . "

3. 29 U.S.C. § 623(a)(1) (1985).

"§ 623. *Prohibition of age discrimination.*

(a) *Employer practices.*

It shall be unlawful for an employer –

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any

individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; . . . . "

4. 42 U.S.C. § 2000e-2(a) (1981).

"§ 2000e-2. *Unlawful employment practices.*

(a) It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . . . "

5. Utah Code Ann. § 76-6-405(1) (1990).

"76-6-405. *Theft by deception.*

(1) A person commits theft if he obtains or exercises control over property of another by deception and with a purpose to deprive him thereof."

6. Utah Code Ann. § 76-6-412(1)(a)(i) (1990).

"76-6-412. *Theft – Classification of offenses – Action for treble damages against receiver of stolen property.*

(1) Theft of property and services as provided in this chapter shall be punishable:

(a) as a felony of the second degree if the:

(i) value of the property or services exceeds $1,000; . . . . "

STATEMENT OF THE CASE

1. Petitioner is a former Hercules employee who was employed as a Quality Control Inspector for Hercules' Bacchus Works in Magna, Utah ("Hercules") from January 7, 1980 to April 25, 1986, when she was involuntarily terminated. R. App. at 2.

2. Upon termination, petitioner sued respondents alleging violations of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.*, and violations of state law. R. App. at 2.

3. After petitioner was terminated, respondents discovered evidence that she had engaged in a pervasive pattern of dishonesty beginning at the time she applied for employment and continuing to the date of her discharge. R. App. at 2-3, 7.

4. The uncontroverted evidence of misconduct included various acts of dishonesty, three of which constituted felonies under state or federal law. The misconduct is set out below.

5. On her employment application, despite being notified in writing that any misrepresentation on the application could result in cancellation of her application, withdrawal of any offer of employment to her, or termination of her employment, petitioner lied about her age, lied about the fact that she had previously applied for employment with Hercules, and lied about her previous employer. R. App. at 2, 3.

6. On a pre-employment form, despite certifying in writing that she was providing true and correct information, petitioner lied about her age. R. App. at 2; Aplee. Supp. App. at 3, 83.

7. On a separate pre-employment personal history form, petitioner lied about her date of graduation from high school, lied about the ages of her children, lied about her job experience, and claimed she had completed two quarters of college when in fact she had not. R. App. at 2; Aplee. Supp. App. at 9-11, 52-53, 87-90.

8. During the course of her employment, petitioner repeatedly lied on various "Intra-Plant" job applications at Hercules about her educational background. Once in 1983, once in 1984, and four times in 1985, petitioner asserted in such applications that she had "1½ years of college," when in fact she had completed no college courses. Aplee. Supp. App. at 29-44, 150-55.

9. In connection with her employment, petitioner applied for medical insurance membership with Blue Cross-Blue Shield of Utah. On her membership application, petitioner lied about her son's age, thus obtaining insurance coverage for him when he otherwise would not have been covered. R. App. at 2-3. Petitioner's lie resulted in premium payments by Hercules in the amount of $2,249.82, and payment of at least one unauthorized claim by Blue Cross-Blue Shield. R. App. at 7, n.2; Aplee. Supp. App. at 17-18. Under Utah Code Ann. §§ 76-6-405(1) and 76-6-412(1)(a), petitioner's actions constituted criminal theft, a state felony in the second degree.

10. In connection with her employment, petitioner applied for a security clearance with the United States

Department of Defense. On her application, plaintiff lied about her age, despite certifying in writing that the information was true and that she knew that any misrepresentation or false statement could subject her to criminal prosecution with penalties of up to five (5) years imprisonment and a $10,000 fine. R. App. at 2-3. Under 18 U.S.C. § 1001, petitioner's action constituted a federal felony.

11. At the time of her discharge, petitioner collected from Hercules a lump-sum in settlement of her retirement benefits in the amount of approximately $2,857.93, which sum was calculated upon her falsified age, and which sum she would not have been entitled to had her age correctly been reported. Aplee. Supp. App. at 138-39. Petitioner did not inform Hercules that she was not in fact the age she claimed to be. *See id.* Under Utah Code Ann. §§ 76-6-405(1) and 76-6-412(1)(a), petitioner's action constituted criminal theft, a state felony in the second degree.

12. Firing petitioner for these acts of misconduct would have been consistent with Hercules policy, and respondents would in fact have fired petitioner had they learned of her misconduct. R. App. at 3-4.

13. In the trial court, respondents moved for summary judgment on all of petitioner's claims on the grounds that this after-acquired evidence of misconduct barred petitioner's claim under the doctrine in *Summers v. State Farm Mutual Automobile Ins. Co.*, 864 F.2d 700 (10th Cir. 1988), and the District Court granted respondents' motion relying on *Summers*. Pet. App. at 23, 25, 35.

14. On appeal, petitioner asserted that summary judgment should be reversed because (1) her conduct was not serious and pervasive, (2) her resume fraud was insufficiently material to bar her claim, and (3) there was a dispute of fact over whether Hercules would have fired her had it known of her misconduct. R. App. at 4-5.

15. The Court of Appeals rejected the first and last of petitioner's arguments and expressly refused to consider the resume fraud issue. R. App. at 7, 9, 8.

16. With regard to the resume fraud issue, the Tenth Circuit Court of Appeals stated:

> We need not address whether resume fraud requires such a showing of materiality, however, because Plaintiff's resume misrepresentations were not the only misrepresentations Hercules relied upon in asserting that Plaintiff would have been fired. Plaintiff also lied, under penalty of law, on her Security Clearance form and on her application for health insurance. In light of the seriousness of these misrepresentations, the sheer number of misrepresentations indicating Plaintiff's general disregard for the truth, the sensitivity of her position with Hercules as a Quality Control Inspector, and Hercules' reservation of the right to discharge any employee making a misrepresentation on an employment application, we conclude that Plaintiff's misconduct would have justified her termination.

R. App. at 8.

17. The Court of Appeals also stated with regard to the resume fraud issue:

> In light of our holding, we do not address Hercules' alternative argument that it would not

> have hired Plaintiff had it known of her employment application misrepresentations.

R. App. at 10, n.3.

REASONS FOR DENYING THE PETITION

I. PETITIONER HAS NOT PRESENTED WITH ACCURACY AND CLARITY THE TENTH CIRCUIT COURT OF APPEALS' DECISION, WHICH IS ESSENTIAL TO A READY AND ADEQUATE UNDERSTANDING OF THE POINTS REQUIRING CONSIDERATION.

Petitioner has not clearly and accurately presented the decision of the Tenth Circuit Court of Appeals to the Supreme Court. Petitioner's reproduction of the Appeals Court Decision contains numerous errors, and most importantly, omits some of the Tenth Circuit Court's critical language establishing the fact that this Court does not have jurisdiction over the issue presented in her petition. *Compare, e.g.*: Pet. App. at 8 *with* R. App. at 5, n.1; Pet. App. at 11 *with* R. App. at 7; Pet. App. at 12 *with* R. App. at 7 n.2; Pet. App. at 17 *with* R. App. 10, n.3. Accordingly, under Rule 14.5 of the Supreme Court Rules, the petition for a writ of certiorari should be denied.

II. THE ISSUE RAISED IN THE PETITION, RESUME FRAUD, WAS NOT AN ISSUE PASSED UPON BY THE COURT OF APPEALS AND IS THUS NOT AN ISSUE OVER WHICH THIS COURT HAS JURISDICTION.

Petitioner has asked this Court to consider whether after-acquired evidence of "serious misconduct *in initially obtaining employment*" is a sufficient basis upon which a plaintiff may be denied a remedy for termination of her employment in violation of Title VII and ADEA. In other words, petitioner is asking this Court to visit the issue of the effect of resume fraud as a bar to her federal claims. This issue, however, is not one over which this Court has jurisdiction, because this issue was never passed upon by the Tenth Circuit Court of Appeals in this case.

The Supreme Court's traditional rule precludes a grant of certiorari when "the question presented was not pressed or passed upon below." *See United States v. Williams*, 112 S. Ct. 1735, 1738 (1992) (relying on *Springfield v. Kibbe*, 480 U.S. 257, 266 (1987) (O'Connor, J., dissenting). According to the Court, "this rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed *so long as it has been passed upon . . . .* " *Id.* at 1738-39 (emphasis added). When the Court of Appeals in the case below has not decided the substantive issue presented, however, the Supreme Court may not address the question for the first time. *Accord id.* (quoting *Stevens v. Department of Treasury*, 111 S. Ct. 1562 (1991) for the reverse proposition, that is, if the appeals court has decided the substantive issue, the Supreme Court may review it).

In the case at bar, the substantive issue – whether resume fraud can preclude petitioner's claim – was not decided by the Tenth Circuit Court of Appeals. The Appeals Court *expressly* determined that it *did not have to reach* the issue of the materiality of the resume fraud, *nor did it have to address* the issue of whether Hercules would not have hired petitioner had it known of the lies she made in initially obtaining employment. *See* Statement of the Case ¶¶ 15-17, *supra*.[1]

Instead, the Appeals Court could and did rely on petitioner's post-resume misconduct in affirming summary judgment for Hercules, most importantly, on petitioner's lies leading to the wrongful obtainment of insurance coverage for her son – a state felony – and her lies on a Security Clearance form – a federal felony. *See* Appeals Court Decision at 8 (R. App. at 8). These acts, combined with the sheer number of other misrepresentations, the sensitivity of petitioner's job position, and Hercules' reservation of the right to discharge an employee for lying on an employment application, convinced the Court of Appeals that plaintiff's misconduct justified her termination. *Id.* Because it was undisputed that Hercules did not know of petitioner's misconduct when it fired her and would have fired her had it known, the Tenth Circuit Court of Appeals, applying the after-acquired evidence rule of *Summers*, affirmed the Trial Court's decision. *Id.* at 10 (R. App. at 10).

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[1] The Court of Appeals also expressly refused to decide whether after-acquired evidence of misconduct could operate as less than a total bar to petitioner's claim. *See* Appeals Court Decision at 5, n.1 (R. App. at 5, n.1).

Petitioner misrepresents to the Supreme Court that it has jurisdiction over the issue presented when that is clearly not the case. The Tenth Circuit Court of Appeals did not pass on the substance of the resume fraud issue that petitioner seeks to have this Court review. Accordingly, under the traditional rule regarding Supreme Court jurisdiction, certiorari should be denied.

III. THERE IS NO SPLIT IN THE CIRCUITS ON THE AFTER-ACQUIRED EVIDENCE ISSUE PRESENTED BY THIS APPEAL.

There is no split in the circuits on the issue presented by this appeal. Only two circuit courts have ruled upon the extent to which after-acquired evidence of misconduct that occurred during the employment relationship operates as a bar to a discharged employee's claim for violation of federal employment discrimination laws. The Tenth Circuit Court of Appeals did so in this case and in *Summers v. State Farm Mutual Automobile Ins. Co.*, 864 F.2d 700, 704-09 (10th Cir. 1989), and the Sixth Circuit Court of Appeals did so in *McKennon v. Nashville Banner Pub. Co.*, 9 F.3d 539 (6th Cir. 1993), *petition for cert. filed* (March 30, 1994).[2]

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[2] All other circuit court opinions that respondents have located which address the effect of after-acquired evidence on a federal discriminatory discharge claim concern resume fraud, not misconduct during the employment relationship. *See Dotson v. United States Postal Service*, 977 F.2d 976 (6th Cir. 1992) (lies on employment application and in job interview), *cert. denied*, 113 S. Ct. 263 (1992); *Milligan-Jensen v. Michigan Tech. Univ.*, 975 F.2d 302 (6th Cir. 1992) (lies on employment application), *cert. granted*, 113 S. Ct. 2991, *cert. dismissed*, 114 S. Ct. 22 (1993); *Smith v. General Scanning, Inc.*, 876 F.2d 1315 (7th Cir. 1989) (lies on

These two circuit courts are in complete agreement – the after-acquired evidence of plaintiff's on-the-job misconduct is relevant to the injury she suffered and applies to totally bar her claim.[3] Two circuits in agreement do not create a split. Granting certiorari in this matter would therefore be premature.

IV. EVEN IF THIS COURT HAD JURISDICTION TO REVIEW WHETHER RESUME FRAUD BARS AN EMPLOYEE'S ADEA AND TITLE VII CLAIMS, THIS CASE IS A POOR VEHICLE FOR SETTLING THE AFTER-ACQUIRED EVIDENCE RULE ANNOUNCED IN SUMMERS.

The facts at bar do not make a compelling case for determining whether after-acquired evidence should bar

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resume); *Washington v. Lake County, Ill.*, 969 F.2d 250 (7th Cir. 1992) (lies on employment application); *Kristufek v. Hussmann Foodservice Co., Toastmaster Div.*, 985 F.2d 364 (7th Cir. 1993) (lies in job interview); *Welch v. Liberty Machine Works, Inc.*, - F.3d -, 1994 WL 169682 (8th Cir. May 6, 1994) (lies on resume and employment application); *Wallace v. Dunn Constr. Co., Inc.*, 968 F.2d 1174 (11th Cir. 1992) (lies on resume and employment application). As discussed in the text above, *supra* at 10-12, the resume fraud issue is not properly before this Court.

[3] There is no suggestion in *Summers* that the plaintiff made any argument that after-acquired evidence should operate other than as a total bar to his claim. In this case, petitioner O'Driscoll asserted for the first time at oral argument before the three judge panel of the Tenth Circuit Court of Appeals that heard her appeal, that any bar against her claim should be a partial rather than a total bar. The panel expressly refused to decide the issue, saying it had no authority to overrule *Summers*. *See* Appeals Court Decision, n.1 (R. App. at n.1). Petitioner had every opportunity to pursue an *en banc* rehearing of the issue but failed to do so.

an employee's claim of discriminatory discharge. Here, petitioner's misconduct was extremely egregious. She did not just engage in one or two misstatements in her employment application. Rather, outside of her resume fraud, from the day petitioner was employed until the day she was fired, she engaged in a pervasive pattern of knowingly and willfully made self-serving lies, including three lies so serious that they amounted to state or federal felonies. *See* Statement of the Case, ¶¶ 5-11.

In this context, petitioner's policy argument that the after-acquired evidence doctrine in *Summers* makes her worse off than if she had never sued simply smells bad. Petitioner is like an employee who murders her boss and then claims entitlement to compensation during the pendency of the investigation. Her unclean hands completely shut down any stirrings one otherwise might have felt about the public good to be served in requiring the employer to bear the cost of defending against her claims of discrimination. Surely there will be a more savory case than this one in which to face the issue of the implications of after-acquired evidence of fraudulent conduct during employment.

CONCLUSION

For the foregoing reasons, Respondents respectfully request the Court to deny the petition for writ of certiorari.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

DOROTHEA O'DRISCOLL, Plaintiff-Counter-Defendant-Appellant, vs. HERCULES INC., a Delaware corporation; JOHN F. BAKER; EDWARD D. McDONALD, Defendants-Counter-Claimants-Appellees.	)	No. 92-4164

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF UTAH
(D.C. No. 89-CV-297W)

(Filed Jan. 5, 1994)

Phillip B. Shell of Day & Barney, Murray, Utah, for Plaintiff-Counter-Defendant-Appellant.

Keith E. Taylor (Spencer C. Austin, Douglas R. Davis with him on the brief), of Parsons, Behle & Latimer, Salt Lake City, Utah, for Defendants-Counter-Claimants-Appellees.

Before BALDOCK, BARRETT, and EBEL, Circuit Judges.

BALDOCK, Circuit Judge.

Plaintiff Dorothea O'Driscoll appeals the district court's grant of summary judgment in favor of Defendants. The district court certified the judgment in this multiple-claim litigation under Fed. R. Civ. P. 54(b), and we exercise jurisdiction pursuant to 28 U.S.C. § 1291.

Plaintiff was employed as a Quality Control Inspector for Hercules, Inc. Bacchus Works in Magna, Utah ("Hercules") from January 7, 1980 until she was terminated on April 25, 1986. Upon termination, Plaintiff filed suit against Hercules and others alleging violations of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, as well as violations of state law including breach of employment contract and wrongful termination.

While preparing for trial, Hercules discovered evidence of misconduct on the part of Plaintiff that it was unaware of when it terminated Plaintiff. The uncontroverted after-acquired evidence of misconduct included the following: (1) on her employment application, Plaintiff misrepresented her age so as to appear five years younger, falsely represented that she had never previously applied for employment with Hercules, and failed to disclose a previous employer; (2) on her pre-employment forms, Plaintiff misrepresented her age, date of graduation from high school, ages of her children, and falsely represented that she had completed two quarters of study at Salt Lake City Technical College; (3) on her application for membership with Blue Cross-Blue Shield of Utah, Plaintiff misrepresented the age of her son, who would have been otherwise ineligible for coverage as

Plaintiff's dependant; and (4) on her "Application and Authorization for Access to Confidential Information" ("Security Clearance"), a United States Government form, Plaintiff misrepresented her age.

In support of its motion for summary judgment, Hercules provided evidence of the foregoing misrepresentations made by Plaintiff as well as a copy of Plaintiff's employment application which contained the following language above Plaintiff's signature:

> I understand that any misrepresentation made by me herein may result in the cancellation of this employment application, withdrawal of any offer of employment or if already employed by Hercules [ ] termination of employment without any obligation or liability to me other than payment of the rate agreed upon for services actually rendered.

Hercules also submitted a copy of Plaintiff's Security Clearance form which read:

> I certify that I know that any misrepresentation or false statement made by me herein may subject me to prosecution under Title 18, United States Criminal Code, Sections 911 and 1001 with penalties up to five (5) years imprisonment and $10,000 fine.

Plaintiff's signature appeared directly beneath this language. In addition, Hercules provided affidavits by two former Vice Presidents of Hercules wherein each asserted that Plaintiff would have been terminated if Hercules had known of Plaintiff's misrepresentations. Finally, Hercules

presented evidence that terminating Plaintiff for the misconduct would have been consistent with company policy.

In defense of Hercules' summary judgment motion, Plaintiff provided evidence of misconduct on the part of various employees which did not result in their termination. These incidents included unexcused absences, false statements concerning an employee's whereabouts while on duty, falsification of time cards, tardiness, and sleeping while on duty. Plaintiff also pointed to a statement in Hercules' Management Manual Procedure indicating that, unless otherwise stated, violations that occurred more than twelve months prior to a current violation should not be considered by the supervisor in determining the disciplinary action for the current violation.

The district court, relying on *Summers v. State Farm Mutual Automobile Ins. Co.*, 864 F.2d 700 (10th Cir. 1988), granted Defendants' motion for summary judgment. The court determined that under *Summers*, Plaintiff's employment claims failed because even if she was unjustly terminated, she had no right to a remedy due to Hercules' unrefuted evidence that it would have terminated Plaintiff had it known of Plaintiff's misconduct.

On appeal, Plaintiff claims the district court erred in granting Hercules' motion for summary judgment with respect to her age discrimination, breach of contract, and wrongful termination claims because (1) Plaintiff's conduct was not serious and pervasive, (2) Plaintiff's misrepresentations on her employment application and preemployment forms were not material, and (3) there remained a genuine issue of material fact regarding

whether Hercules would have terminated Plaintiff if it had known of her misconduct.[1] Plaintiff does not dispute the district court's conclusion that *Summers* applies to claims for breach of contract and wrongful termination; rather, Plaintiff claims that the court erred in applying *Summers* to these facts. We review the district court's grant of summary judgment de novo, applying the same standard as the district court. *Osgood v. State Farm Mut. Auto Ins. Co.*, 848 F.2d 141, 143 (10th Cir. 1988).

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In considering a summary judgment motion, we do not weigh the evidence; rather, we determine whether "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986), *see also Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Once the movant points to those portions of the record which demonstrate an absence of a genuine issue of material fact, the burden shifts to the nonmovant to "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

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[1] At oral argument, Plaintiff also asserted that we should modify *Summers* so that it did not operate to completely bar recovery in an employment discrimination suit. However, even if we agreed with Plaintiff's position, a three-judge panel cannot disregard or overrule circuit precedent. *United States v. Spedalieri*, 910 F.2d 707, 710 n.3 (10th Cir. 1990).

In *Summers*, the plaintiff employee sued his employer, claiming he was terminated because of his religion and age. 864 F.2d at 701-02. Prior to being terminated, Summers had been placed on probation for falsifying several claims documents, and had been warned that he would be terminated if he engaged in further falsifications. *Id.* at 702. After several months, Summers was terminated for reasons unrelated to the claim falsifications. *Id.* at 702-03. During preparation for trial, the employer discovered that Summers had falsified over 150 documents, including eighteen that were falsified after Summers' probation. *Id.* at 702. The employer moved for summary judgment, arguing that even if Summers could prove that he was terminated for discriminatory reasons, Summers should have no remedy because the employer had an independent basis for terminating him and would have terminated him had it known of the misconduct. *Id.* at 704. We agreed with the employer that the after-acquired evidence of Summers' misconduct could be considered stating:

> [W]hile such after-acquired evidence cannot be said to have been a "cause" for Summers' discharge in 1982, it is relevant to Summers' claim of "injury," and does itself preclude the grant of any present relief to Summers. . . . The present case is akin to the hypothetical wherein a company doctor is fired because of his age, race, religion, and sex and the company, in defending a civil rights action, thereafter discovers that the discharged employee was not a "doctor." In our view, the masquerading doctor would be entitled to no relief, and Summers is in no better position.

Id. at 708. *Accord Washington v. Lake County*, 969 F.2d 250 (7th Cir. 1992); *Johnson v. Honeywell Info. Sys., Inc.*, 955 F.2d 409 (6th Cir. 1992). *But see Wallace v. Dunn Constr. Co.*, 968 F.2d 1174 (11th Cir. 1992) (rejecting *Summers* approach).

Plaintiff first claims that the district court erred in applying *Summers* because Plaintiff's conduct was not "serious and pervasive." We reject this claim because under *Summers*, there is no threshold requirement of serious and pervasive misconduct. Rather, for after-acquired evidence of employee misconduct to bar relief in a termination case, *Summers* merely requires proof that (1) the employer was unaware of the misconduct when the employee was discharged; (2) the misconduct would have justified discharge; and (3) the employer would indeed have discharged the employee, had the employer known of the misconduct. *See Summers*, 864 F.2d at 708; *see also Johnson*, 955 F.2d at 414. Furthermore, we disagree with Plaintiff's characterization of her conduct as "not meaningful" and "isolated." Plaintiff's multiple misrepresentations included a false statement on a Security Clearance form which contained a warning that such a statement was a federal felony, and a misrepresentation concerning the age of her youngest son, which allowed him to wrongfully obtain coverage under her health insurance plan.[2] Thus, Plaintiff's repeated misrepresentations demonstrated a pattern of dishonesty and disregard for the truth.

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[2] As a result of Plaintiff's misrepresentations concerning her son's age, Hercules paid $2,249.82 in extra insurance premiums over and above what it would have been required to pay for individual coverage.

Plaintiff also claims that summary judgment was inappropriate because her misrepresentations on her employment application and pre-employment forms were not material. In other words, Plaintiff argues that Hercules would not have been justified in terminating Plaintiff for these misrepresentations. In support of this argument, Plaintiff cites Johnson, 955 F.2d 409, in which the Sixth Circuit held that summary judgment is not appropriate in a case of resume fraud unless the misrepresentation or omission was material – *i.e.*, the employer would not have hired the employee if it had known the truth. *Id.* at 414. We need not address whether resume fraud requires such a showing of materiality, however, because Plaintiff's resume misrepresentations were not the only misrepresentations Hercules relied upon in asserting that Plaintiff would have been fired. Plaintiff also lied, under penalty of law, on her Security Clearance form and on her application for health insurance. In light of the seriousness of these misrepresentations, the sheer number of misrepresentations indicating Plaintiff's general disregard for the truth, the sensitivity of her position with Hercules as a Quality Control Inspector, and Hercules' reservation of the right to discharge any employee making a misrepresentation on an employment application, we conclude that Plaintiff's misconduct would have justified her termination.

Finally, Plaintiff claims that a genuine issue of material fact existed as to whether Hercules would have terminated Plaintiff if it had known of her misconduct. Hercules provided affidavits by company management personnel that Plaintiff would have been terminated immediately if the company had discovered Plaintiff's

misrepresentations. Hercules further supported this claim by relying on the language in Plaintiff's employment application that she may be terminated for any misrepresentations, as well as language in Hercules' procedure manual which demonstrated that termination based on Plaintiff's misconduct would have been consistent with company policy. Upon this showing, the burden shifted to Plaintiff to go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324.

We conclude that Plaintiff failed to point to any evidence that created an issue of fact regarding whether Hercules would have fired Plaintiff had it known of her repeated misrepresentations. That portion of Plaintiff's evidence, which consisted of incidents involving other employees who were guilty of misconduct yet were not terminated, does not rebut Hercules' claim that Plaintiff would have been fired. Plaintiff has presented no evidence that Hercules failed to terminate an employee for misconduct equivalent to her series of misrepresentations. Plaintiff's evidence of employee misconduct involving unexcused absences, tardiness, and sleeping while on duty are simply unrelated to Plaintiff's misconduct. Moreover, Plaintiff's evidence of misrepresentations by other employees involved relatively minor infractions such as false statements concerning an employee's whereabouts while on duty, not such serious matters as false statements on an employment application, a Security Clearance form, or false statements leading to unwarranted health insurance coverage for a dependant. Furthermore, Hercules' stated policy that violations occurring more than twelve months prior to a current

violation should not be considered in determining the disciplinary action for the current violation also does not help Plaintiff. This policy statement refers only to violations occurring more than twelve months earlier that were *known* to Hercules. Plaintiff presented no evidence that Hercules had a policy of forgiving *unknown* violations more than twelve months old. Plaintiff has therefore failed to make "a showing sufficient to establish the existence of an element essential to [her] case, and on which [she] will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

In summary, we conclude that, under *Summers*, Hercules' after-acquired evidence of Plaintiff's misconduct precludes Plaintiff from obtaining relief for her termination. This is so because Hercules successfully demonstrated that it did not know of Plaintiff's misconduct when she was terminated, it would have been justified in terminating Plaintiff for the misconduct, and it would, in fact, have terminated Plaintiff had it known of her misconduct.[3]

AFFIRMED.

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[3] In light of our holding, we do not address Hercules' alternative argument that it would not have hired Plaintiff had it known of her employment application misrepresentations.